

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
June 19, 2007 Session

STATE OF TENNESSEE v. MICHAEL SHAYNE COCHRAN

**Direct Appeal from the Criminal Court for Davidson County
No. 2005-D-3009 Monte Watkins, Judge**

No. M2006-02175-CCA-R3-CD - Filed October 1, 2007

The appellant, Michael Shayne Cochran, pled guilty in the Davidson County Criminal Court to driving under the influence (DUI) per se. Pursuant to the plea agreement, the appellant received an eleven month, twenty-nine-day sentence to be served as fifty hours in confinement and the remainder on probation and agreed to pay a three hundred fifty dollar fine. The appellant also reserved a certified question of law as to whether the trial court erred by refusing to suppress his blood alcohol content (BAC) test results when the appellant decided soon after his blood had been drawn that he did not want to consent to the test. Upon our review of the record and the parties' briefs, we affirm the trial court's denial of the motion to suppress.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which DAVID H. WELLES and ROBERT W. WEDEMEYER, JJ., joined.

C. Edward Fowlkes, Nashville, Tennessee, for the appellant, Michael Shayne Cochran.

Robert E. Cooper, Jr., Attorney General and Reporter; Brent C. Cherry, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Kristen Shea, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

The parties stipulated to the following facts as summarized in the trial court's written order denying the appellant's motion to suppress:

[T]he defendant was driving on Broadway near 4th Ave. S. December 10, 2004 when Officer Ronald Lucarini, Jr. observed the vehicle with . . . no lights on in the dark. Upon the officer approaching the

vehicle, the officer observed the smell of alcohol on the defendant and his watery red eyes and slurred speech. The defendant admitted to drinking a half pint bottle of vodka. Therefore, the officer administered the standardized field sobriety test. After the defendant had some variation on his performance on the test, the officer placed the defendant under arrest, read the implied consent and asked the defendant if he would submit to a blood alcohol test. The defendant voluntarily consented and was transported to Metro General Hospital for the blood specimen. After two vials of blood [were] drawn [and] while the officer was sealing the vials to send to the Tennessee Bureau of Investigation, the defendant stated that he had talked to his attorney and that he was advised to refuse the test. Subsequently, the defendant refused the test.

According to the Official Alcohol Report in the appellate record, the Tennessee Bureau of Investigation (TBI) received the appellant's blood sample on January 11, 2005, and analyzed the sample on February 2, 2005. His blood was found to have a BAC of 0.11%, and a Davidson County grand jury indicted him for DUI of an intoxicant, DUI per se, and driving on a suspended license.

Subsequently, the appellant filed a motion to suppress the results of his BAC test, arguing that although he initially consented to the test and allowed his blood to be drawn, he subsequently revoked his consent for the test. He claimed that because he revoked his consent before the TBI analyzed the blood sample, the test results had to be suppressed. However, the trial court disagreed, stating that "the defendant gave consent to the blood test before his blood was drawn. Therefore, the motion to suppress is respectfully denied." The appellant contests that ruling.

II. Analysis

The trial court's findings of fact in a suppression hearing will be upheld on appeal unless the evidence preponderates against those findings. State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996).

Questions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact. The party prevailing in the trial court is entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from that evidence.

Id. However, the application of the law to the trial court's findings of fact is a question of law subject to de novo review. State v. Yeargan, 958 S.W.2d 626, 629 (Tenn. 1997).

Generally, a person commits DUI per se when the person drives or is in physical control of a vehicle on any public road in this state while the alcohol concentration of the person's blood is

0.08% or more. Tenn. Code Ann. § 55-10-401(a)(2) (2004). Tennessee Code Annotated section 55-10-406, the implied consent statute, provides that

[a]ny person who drives a motor vehicle in this state is deemed to have given consent to a test or tests for the purpose of determining the alcoholic content of that person's blood, a test or tests for the purpose of determining the drug content of such person's blood, or both such tests. However, no such test or tests may be administered pursuant to this section, unless conducted at the direction of a law enforcement officer having reasonable grounds to believe such person was driving while under the influence of alcohol, a drug, any other intoxicant or any combination of alcohol, drugs, or other intoxicants For the results of such test or tests to be admissible as evidence, it must first be established that all tests administered were administered to the person within two (2) hours following such person's arrest or initial detention.

Tenn. Code Ann. § 55-10-406(a)(1) (Supp. 2006). If the arrested driver has been requested by a law enforcement officer "to submit to either or both such tests, and having been advised of the consequences for refusing to do so, refuses to submit, the test or tests to which the person refused shall not be given, and such person shall be charged with violating this subsection (a)." Tenn. Code Ann. § 55-10-406(a)(4)(A) (Supp. 2006). "Test" is defined as "any chemical test designed to determine the alcoholic or drug content of the blood. The specimen to be used for such test shall include blood, urine or breath." Tenn. Code Ann. § 55-10-405(5). "[T]he results of any test or tests conducted on the person so charged shall be admissible in evidence in a criminal proceeding." Tenn. Code Ann. § 55-10-407(a) (Supp. 2006).

The appellant contends that "the plain unambiguous language of T.C.A. 55-10-403(a) provides that the test is a chemical procedure performed on a blood sample" and that the results of his BAC test should have been suppressed because, although he initially consented to the test and allowed his blood to be drawn, he revoked his consent before the TBI performed chemical analysis on the sample. However, in our view, the statute's repeated reference to "test" does not plainly and unambiguously refer only to a chemical analysis. For example, the last sentence in Tennessee Code Annotated section 55-10-406(a)(1) requires that the "test" be administered within two hours following the driver's arrest. Obviously, the legislature did not intend for chemical analysis to be performed on the blood sample within two hours of the driver's arrest but intended that the sample for the chemical analysis be collected from the driver within two hours of his or her arrest.

The appellant also contends that in addition to the plain language of the statute, it is well-settled that a defendant may revoke consent to search. In support of his argument, he cites State v. Troxell, 78 S.W.3d 866 (Tenn. 2002), a case involving the search of the defendant's vehicle, and argues that a suspect can limit the scope of the consent to search or withdraw it completely at any time. See State v. Cox, 171 S.W.3d 174, 186 & n.11 (Tenn. 2005). Like typical search and seizure

cases, a case involving the collection of a blood sample and the chemical analysis of that sample are subject to the constitutional limitations of the Fourth Amendment and Article I, Section 7 of the Tennessee Constitution, which protect against unreasonable searches and seizures. See State v. Scarborough, 201 S.W.3d 607, 616 (Tenn. 2006). However, unlike those typical cases, the implied consent statute expressly allows for the warrantless search of a motorist's breath or blood, and the motorist's right to refuse consent is not a constitutional right. State v. Humphreys, 70 S.W.3d 752, 761 (Tenn. Crim. App. 2001).

The implied consent statute repeatedly refers to the motorist's right to refuse to submit to an alcohol concentration test. Moreover, the purpose of the statute is to prevent violent confrontations that could result from law enforcement officers forcing breath and blood tests on motorists against their will. Id. Once a defendant consents to testing and allows his or her blood to be drawn, the purpose of the implied consent statute has been satisfied, even if the defendant later revokes consent for chemical analysis. Thus, we conclude that the results for a BAC test conducted on a conscious defendant who is capable of consenting to a blood draw are admissible, even if the defendant changes his or her mind after the sample has been collected. As this court has stated, "Our law is clear that the only time 'the test shall not be given' is when the motorist 'refuses to submit' to the test." Id. at 762.

Turning to the instant case, the appellant admits that he agreed to the blood test and voluntarily allowed his blood to be collected. Given that the appellant had no constitutional right to refuse the test in the first place, the arresting officer could then submit the sample to the TBI for chemical analysis. Upon receipt, the TBI was required to examine the sample to determine its alcohol concentration and report those results to the appropriate district attorney general. See Tenn. Code Ann. § 55-10-410(b), (c). Therefore, the trial court properly denied the appellant's motion to suppress and allowed the blood alcohol test results into evidence. We note that to allow a defendant to consult with his attorney and revoke his consent to testing hours, days, or even weeks after a breath or blood sample is collected would essentially circumvent the firmly established rule in this state that a defendant has no right to consult with counsel before he submits to the test. See State v. Frasier, 914 S.W.2d 467, 471 (Tenn. 1996). The appellant is not entitled to relief.

III. Conclusion

Based upon the record and the parties' briefs, we affirm the judgment of the trial court.

NORMA McGEE OGLE, JUDGE